Filed 5/24/22 Arashiro v. Schultz CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ERICA ARASHIRO, Plaintiff and Appellant, v. DEBRA SUZANNE SCHULTZ, Defendant and Respondent.	C089099 (Super. Ct. No. 34-2016-00203438-CU-PA-GDS)

In 2016, defendant Debra Suzanne Schultz looked away from the road when driving, and plaintiff Erica Arashiro was injured in the resulting traffic accident. After receiving treatment from a medical doctor specializing in pain management, plaintiff chose to end that treatment, and did not seek any other treatment for about one year, when she began seeing a chiropractor. Defendant's expert witness testified the pain treatment plaintiff received soon after the traffic accident was not necessary, as physical therapy "works 95 percent of the time" for the "whiplash" that plaintiff suffered. The

expert also testified there was "no anatomic basis" for the pain plaintiff said she felt at the 2018 trial.

A jury awarded total damages of $34,257, though plaintiff's past medical expenses alone were nearly $60,000.

On appeal, plaintiff argues the trial court erred by (1) admitting defense expert testimony regarding the reasonableness and necessity of treatment she received; (2) instructing the jury it could find plaintiff failed to mitigate her damages; and (3) admitting evidence of plaintiff's communications with her attorneys about treatment for her injuries. Plaintiff also argues (4) there was not substantial evidence for the jury's verdict, and (5) cumulative error.

We conclude plaintiff forfeited on appeal her first claim, and find her other claims unpersuasive. Accordingly, we affirm.

BACKGROUND

A. *Plaintiff's testimony*

In June 2016, defendant looked away from the road when driving, and collided with the car in front of her, which car then rear-ended plaintiff's vehicle. Plaintiff immediately felt a "throbbing" pain in her head, shoulder, and lower back.

An ambulance took plaintiff to a hospital emergency room, where a doctor told her that CT scan and X-ray imaging tests of her body were "clear," as he "didn't see anything." The doctor also prescribed pain medication for plaintiff, telling her there was a "big possibility that [she] would feel the real pain" later that day, "after the shock and adrenaline wore off."

Plaintiff was in a lot of pain the next day, and the pain was increasing. On a scale of zero to 10, with zero being no pain at all and 10 being the most excruciating pain imaginable, plaintiff's pain level was at seven immediately after the accident, and at "eight or nine" the week afterwards.

Plaintiff "just wanted to get better," so she "decided . . . to go straight to a pain specialist," Dr. Tarasenko, as she "did not have an assigned medical provider" at the time. Dr. Tarasenko, who saw plaintiff 11 days after the accident, suggested a "medial branch block" technique to diagnose "where exactly the pain was coming from."

Plaintiff underwent the procedure, and told Dr. Tarasenko that she had "temporary relief for about four hours." A second iteration of the diagnostic procedure resulted in relief lasting a couple of hours longer.

Given those results, Dr. Tarasenko recommended plaintiff receive radiofrequency ablation therapy to "burn th[e] nerves" "where the pain was coming from." Plaintiff underwent the procedure and experienced "a few weeks of relief." But the pain returned (though at lower levels), so Dr. Tarasenko ordered an MRI in September 2016, which came back "clean."

Plaintiff underwent a second round of the medial branch block diagnostic procedure, followed by radiofrequency ablation. There were "a few weeks' worth of relief but . . . the pain . . . return[ed]" "like it was in the beginning" before plaintiff received any treatment. Plaintiff received "trigger-point injections to help with [her] headaches" and more radiofrequency ablation, which again provided pain relief for only a few weeks.

"At that point, a year had gone by since [plaintiff's] accident, so [she] decided to take it upon [herself] to . . . do the stretches and . . . adjust [her] life and deal with the pain." In her "opinion at that time, . . . [she] wasn't going to get better, and so . . . [she] decided to stop seeing Dr. Tarasenko."

About a year later, in June 2018, plaintiff "decided that [she] was not going to be able to . . . just do the stretches or adjust[ ] things in [her] life, and that is when [she] decided to try something different and see a chiropractor"—Dr. Wong. At the time of the October 2018 trial, plaintiff was still seeing Dr. Wong two or three times a week. Plaintiff explained that for "a day, day and a half" after Dr. Wong's treatments, "the pain

[was] tolerable" or even absent. But when plaintiff missed an appointment days before she testified, "[t]he pain completely returned, fully" to a level six—in her head, back, neck and shoulder.

Plaintiff testified that due to daily headaches, she took over-the-counter ibuprofen; took "four to five breaks a day" when working to "go lay down"; and had to spread her 40-hour workweek over seven days, to "break up [the] job." She still felt "pins and needles" pain in her neck every day, and had "throbbing pain" in her right shoulder that "flare[d] up" when she worked on the computer.

Before the accident, plaintiff went to the gym five to six days per week, and enjoyed hiking, dancing, and taking her young daughters to theme parks, all without pain. After the accident, those activities were painful, and she was "just not able to do" them regularly.

Plaintiff also had to change her daily activities "to break those up and plan ahead." Tucking in her daughters at night became difficult because it was painful to "reach [her] arms up" to the top of a bunk bed. Plaintiff's boyfriend had to do "the majority of the cooking . . . vacuuming and cleaning."

In connection with her injuries, plaintiff testified she owed $59,578.22, as reflected in exhibit No. 13, a document showing the costs of services and treatments that plaintiff received from various entities, including the Sacramento Metro Fire District and the private practices of Doctors Tarasenko and Wong.

Cross-examination of plaintiff

Though she had the ability to "go through the process of getting a primary care physician," plaintiff did not seek to obtain the services of a primary care physician, an orthopedist, or a chiropractor before she went to see Dr. Tarasenko 11 days after the accident. Nor did plaintiff go to an urgent care clinic. She did see an attorney before she saw Dr. Tarasenko. In fact, she picked Dr. Tarasenko from a list her attorneys gave to

her of pain management specialists who worked on lien (meaning plaintiff would not be expected to pay for services until resolution of her lawsuit).

Dr. Tarasenko did not "discharge" plaintiff from treatment; rather, plaintiff chose to stop seeing the doctor after about one year of treatment, because she was not obtaining the pain relief she hoped for. Plaintiff "never had [a] conversation with" Dr. Tarasenko informing him of her decision. When she stopped seeing Dr. Tarasenko, plaintiff did not seek an appointment with a primary care physician, a physical therapist, an orthopedist, or a different pain management specialist.

From July 2017 to July 2018, plaintiff sought no medical treatment for injuries from the accident. In July 2018, the same week defense counsel deposed her, plaintiff chose Dr. Wong from a list of chiropractors that her attorneys gave to her, also with the understanding that Dr. Wong was willing to work on lien.

B. *Plaintiff's lay witnesses*

Plaintiff's sister and boyfriend testified to the changes in plaintiff's behavior after the June 2016 accident.

The sister said plaintiff was "always on the go" before the accident, exercising and taking her daughters to the park; and never appeared to have any physical limitations or chronic pain. But after the accident, plaintiff was "not the same anymore." She couldn't carry her daughters or go the gym. Her energy level was about 70 percent what it was before.

Similarly, plaintiff's boyfriend testified that he and plaintiff engaged in "very physical" activities together before the accident, including hiking and going to the gym. Plaintiff never appeared to have physical limitations or pain. After the accident, things were "not the same." Plaintiff rarely went to the gym. "[A]nd if she [did] go" to the gym, the boyfriend "hear[d] about it afterwards. Her pain or her mood changes." After the accident, plaintiff's energy level was about "60, 65 percent" what it was before.

C. *Plaintiff's treatment providers*

Dr. Tarasenko

Licensed to practice medicine in California, Dr. Tarasenko began treating plaintiff for pain in July 2016. During a "standard physical exam," Dr. Tarasenko "noticed that [plaintiff] had . . . significant tenderness of a . . . facet joint on the right side of her neck," along with "significant limitations with range of motion" in her neck.

Dr. Tarasenko explained that facet joints are connections between the bones of the spine that allow the spine to bend and turn. Injuries to the facet joints generally do not appear on X-rays or MRIs.

Dr. Tarasenko explained that as a "pain management" doctor, he had a "different school of thought" than primary care physicians (who "tend to put patients on pain medications") and orthopedic surgeons (who, seeing that the "MRI is normal," conclude "nothing is broken, nothing needs to be fixed"; "take a break . . . you're going to be fine at some point"): he tries to "pinpoint the . . . pain generator . . . where the pain is exactly coming from." To do that, the doctor employs "medial branch block" tests, using a needle to inject local anesthetic "to block [a] joint temporarily" to determine if the pain a patient feels comes from a specific joint. "Medial branch is the name of the nerve[ ]" that "sends a signal from the joint to the brain."

After performing two medial branch block tests on plaintiff over several weeks, Dr. Tarasenko concluded that "about 50 percent" of the pain plaintiff felt in her neck area was coming from the facet joint. Given that diagnosis, Dr. Tarasenko recommended radiofrequency ablation of the medial branch nerves—a procedure involving a "very expensive" device that heats the tip of a "very sophisticated needle" to 80 degrees centigrade. The needle is applied to the relevant nerve on a patient's body in the expectation that the intense heat will "block those nerves between six months and 18 months."

Plaintiff underwent radiofrequency ablation in her "low neck" area, and reported pain relief of 50 percent. After the first radiofrequency ablation procedure, Dr. Tarasenko gave plaintiff six to eight "trigger-point injection[s]" of numbing medicines to "tender spots" that plaintiff complained of in her muscles. Plaintiff reported pain relief for "a couple of weeks."

Given plaintiff's continued pain, especially in the "upper-neck area," Dr. Tarasenko conducted another round of diagnostic medial branch block tests and radiofrequency ablation, focusing on the upper part of plaintiff's neck. Plaintiff reported "approximately 50 percent pain relief in her upper-neck area."

In Dr. Tarasenko's professional opinion, all the procedures he performed on plaintiff were—to a reasonable degree of medical certainty—more likely than not, necessary. The last procedure Dr. Tarasenko performed on plaintiff was in July 2017. Dr. Tarasenko further testified that plaintiff "might need" pain treatment "probably for the rest of her life, but . . . at least six or 10 times."

Dr. Tarasenko read—and "strongly disagree[d]" with—the defense medical expert's evaluation report and opinion that plaintiff "suffered a myofascial sprain or strain of her neck." The difference of opinion stemmed largely from "different school[s] of thought" regarding "the philosophy of identifying . . . and treating the pain source." Dr. Tarasenko had "seen a lot of patients . . . referred to [him] because . . . they went through [a] pattern of treatment after [an] accident. Healthy, young person, sustain[s] [an] accident, and they then were put on some physical therapy, which usually aggravate[s] the pain. Chiropractic adjustments usually aggravate the pain, and patients don't want to go back to the same treatment because pain is getting worse every time when they have . . . physical therapy and chiropractic adjustment. And then, eventually [they] end up taking narcotics[s]. And . . . [Dr. Tarasenko] ha[d] a strong disagreement with th[at] approach."

Dr. Tarasenko disagreed with defendant's medical expert's opinion that "pretty much all of [the] treatment" he provided to plaintiff "was completely unnecessary," as the defense expert was "not a pain management doctor," and plaintiff's condition "is purely pain management."

With the aid of several exhibits reflecting "billing charges" to plaintiff, Dr. Tarasenko testified that "facility fees [were] $6,520" for radiofrequency ablation, while medial branch block "facilities fees [were] $3,005."

Cross-examination of Dr. Tarasenko

The first time he saw plaintiff, Dr. Tarasenko referred her to physical therapy, because when radiofrequency ablation happens first, physical therapy can be beneficial to patients. Dr. Tarasenko did not know if plaintiff followed his recommendation. Dr. Tarasenko never discharged plaintiff from treatment, had not seen plaintiff since July 2017, and did not know whether plaintiff received any other kinds of treatment since plaintiff stopped seeing him.

"[T]he only treatment available" for someone with plaintiff's condition—"a microfracture inside" the facet joint, called "facet joint arthropathy"—is ongoing pain management treatment, the doctor testified.

Dr. Wong

A licensed chiropractor, Dr. Wong began treating plaintiff in July 2018, had treated her on 22 occasions, and was still treating her at the time of trial. On her first visit to Dr. Wong, plaintiff complained of "right neck and upper back pain, headaches, and right upper arm and elbow pain, and shoulder pain from a car accident."

Dr. Wong diagnosed plaintiff with "chronic sprain[/]strain of the cervical thoracic spine" ("[m]ost likely" a lifetime condition) along with "other issues," "such as facet, tissues, muscle spasms, and insomnia." Regarding facet issues, Dr. Wong sometimes "sen[t] his patients for medial branch block" procedures or radiofrequency ablations.

Dr. Wong's opinion was that plaintiff's car accident "created a chronic condition in the facet joints to elicit pain," that "may require long-term chiropractic care and other physical therapy modalities" indefinitely. Dr. Wong recommended plaintiff receive chiropractic treatment twice a week. He reached that opinion because chiropractic treatments provide plaintiff "relief up to two days, but" the pain "comes back" when she does physical activity, including working on the computer.

Plaintiff's unpaid bills for Dr. Wong's services totaled $3,126 at the time of trial, with chiropractic sessions costing between $100 and $150 each.

Cross-examination of Dr. Wong

Dr. Wong's opinion, based on "cases [he] treated in the past with similar injuries," was that plaintiff may have had a better result if she had treated with him two years earlier, but he couldn't "definitively say" that for certain. Dr. Wong's "belief system" undergirded his "conservative" approach to treatment, whereby injections for pain are considered *after* a conservative treatment proves ineffective.

Dr. Wong never referred plaintiff to get medial branch blocks or radiofrequency ablations.

D. *Defendant's expert witness*

A professor of orthopedics at the University of California, Davis, Dr. Klein was also the owner of a "medical-legal evaluation office." After reviewing plaintiff's medical records and interviewing and examining her for about 50 minutes, Dr. Klein formed the opinion that the traffic accident caused plaintiff to sustain a "cervical myofascial sprain[/]strain," "[t]he lay term" being "whiplash."

With the help of "a couple of the models that [he] brought as an instruction for the jury," Dr. Klein explained how the "spinal column" consists of multiple parts, including "cervical vertebrae," "facet joints" and nerve tissue. Dr. Klein said he did indeed believe that facet joint injuries occur, as he had treated "[m]any" patients with such injuries, but

emphasized that "85 percent of the tissue around the neck . . . is muscle ligament," while the facet joint is "at most, half to one percent."

Generally, after an injury, Dr. Klein advises "physical therapy to try and break th[e] pain spasm cycle," along with "adjunctive oral medications," to "get through the soft tissue phase first, because initially you don't know that" an injury is "a facet injury until the patient isn't making progress in therapy. And many times, the physical therapist will call and say ['] I think we got a facet problem here, because the patient is not responding to treatment or certain things we're doing are aggravating. . . .['] That's when the red flag goes up and you think you're dealing with a facet problem."

"If at . . . 21 days postinjury, the patient has not . . . made progress" or is making uneven progress, Dr. Klein continued, "[t]hen you might consider doing the facet blocks, which are both diagnostic and therapeutic." If the facet blocks "don't give a significant relief, then you've got to keep pursuing. Is there a fracture, a nondisplaced fracture that we don't see on the X-ray[?]"

Dr. Klein did not have training to conduct facet block procedures, but he referred patients to undergo such procedures "[m]any times."

Dr. Klein did not agree with Dr. Tarasenko's decision to do medial branch blocks, because physical therapy "works 95 percent of the time, and if it isn't working . . . you don't initiate interventional treatment 11 days postinjury." "90 percent of people are back to their preinjury functional level" around six weeks after an injury, even if not entirely free of symptoms. Thus, in Dr. Klein's opinion, "injections . . . weren't necessary" when Dr. Tarasenko did them. Injections *are* "reasonable" *if* "you've proven the other conservative treatment hasn't worked." But plaintiff was "never offered that."

Similarly, Dr. Wong's treatment "wasn't reasonably necessary," because so much time had passed "from the original injury."

There was "no anatomic basis . . . to explain [plaintiff's] complaints." Plaintiff's claimed symptoms and injuries were "too far distant from" the accident "to be related in any way."

In Dr. Klein's opinion, plaintiff did not need any future medical care in connection with the 2016 accident, as "[s]he ha[d] a normal examination of the neck, range of motion, . . . no neurological deficit in her cervical nerve roots or her cord."

Cross-examination of Dr. Klein

Dr. Klein agreed that plaintiff was injured in the June 2016 accident, and reported to him that she continued to feel pain; but he insisted there was no anatomic basis for her pain. The anatomic basis for her pain would have disappeared by July 2017, because "[a]t 13 months post-injury . . . this type of soft-tissue injury would not produce such protracted symptoms in the absence of evidence of neurologic deficit and a normal MRI." Thus, the pain plaintiff reported beginning in July 2017 (and possibly as early as the "six- to nine-month period" after the June 2016 accident) was "purely psychological."

Dr. Klein theorized that "sometime around the six- to nine-month period," plaintiff "became tenacious about holding on to her pain" because she was "alarmed by pain at the extremes of motion and . . . fearful." And no one "[took] the time, as [Dr. Klein] do[es] with [his] patients, to sit down and say: 'You have a normal range of motion. You're returning and doing things. I'm proud of you. You're neurologically intact, and you have a normal MRI.' "

"[T]he interventionalist," like Dr. Tarasenko, "takes the position that it's a facet injury causing the pain," but "the majority of tissue is soft tissue, not the facet, as [one] [could] see on [a] diagram" displayed in open court. "It doesn't make sense that that little facet is producing the . . . radiating pain to [plaintiff's] shoulders. That can't come from facet. Anatomically, it doesn't make sense."

Dr. Tarasenko's course of treatment did not fall below the medical standard of care, and was not medical malpractice. Dr. Tarasenko's treatments were "a reasonable

thing to do . . . if you excluded all other conservative treatment." "[I]t wasn't necessary at 11 days post-injury" to go Dr. Tarasenko's route.

Dr. Klein agreed that but for the June 2016 accident, plaintiff would not have psychological pain.

E. *Jury's verdict*

Recording that defendant "admitted negligence" and "admitted that her negligence was a substantial factor in causing harm to [p]laintiff," the jury awarded the following damages: "1. What are ERICA ARASHIRO's total damages? [¶] a. Past economic loss for medical expenses: $26,257.00. [¶] b. Future economic loss for medical expenses: $0.00. [¶] c. Past noneconomic loss, including physical pain, mental suffering, loss of enjoyment of life, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress: $8,000. [¶] d. Future noneconomic loss, including physical pain, mental suffering, loss of enjoyment of life, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress: $0.00." "TOTAL: $34,257.00"

Plaintiff timely appealed.

DISCUSSION

I

Expert Testimony on Plaintiff's Treatment

Plaintiff argues the trial court erred by admitting Dr. Klein's testimony that treatment she received was not reasonable or necessary. We conclude this argument is forfeited on appeal.

Additional background

During a midtrial discussion on jury instructions, the parties agreed the trial court would instruct the jury with CACI No. 3903A, regarding recovery for damages for plaintiff's reasonable medical expenses resulting from defendant's wrongful conduct. The trial court later provided the jury with that instruction, which says that for past medical expenses, a plaintiff "must prove the reasonable cost of reasonably necessary

medical care that [plaintiff] has received," and for future medical expenses, plaintiff "must prove the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future."

Parties' arguments

Plaintiff argues the trial court "erred in admitting expert testimony that plaintiff's treatment was not 'reasonable' or 'necessary.' " Specifically, plaintiff contends Dr. Klein's "statement that Dr. Tarasenko's treatment was not 'necessary' because [Dr. Klein] would have recommended a different treatment misstates the legal standard for determining the scope of recoverable damages," and thus "was not relevant to the measure of plaintiff's damages." Dr. Klein's opinion that "he would have advised plaintiff to pursue a different course of treatment was not an opinion that 'would assist the trier of fact.' (Evid. Code § 801, subd. (a).)" Plaintiff likewise contends testimony that Dr. Wong's treatment was not " 'reasonably necessary' " (because "it occurred too long after the collision") "was not helpful to the trier of fact" and therefore not "relevant to her damages."

Defendant argues plaintiff forfeited this argument by not objecting to Dr. Klein's testimony at trial. On the merits, defendant argues the trial court did not err, as Dr. Klein's testimony was "probative," because "expert testimony as to the reasonableness or necessity of a particular course of treatment is blatantly relevant" when "calculating the verdict for past medical expenses."

Plaintiff responds that she did not forfeit this argument on appeal, because "any objection to Dr. Klein's testimony on the grounds raised in the opening brief would have been futile." Though plaintiff "filed motions in limine to exclude" *some* areas of testimony by Dr. Klein, "[n]o motion in limine would have been able to keep out the testimony that Dr. Klein actually gave at trial," and "any objections to" the challenged "testimony . . . would have been futile," because there is no "case that allows the exclusion of expert testimony that . . . treatment was not necessary because [the expert]

would have recommended something different." Plaintiff invites us to "clarify the law" on this point.

Relevant legal principles

" 'A judgment will not be reversed on grounds that evidence has been erroneously admitted unless "there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion* . . . ." (Evid. Code, § 353, subd. (a), italics added.) Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence.' " (*People v. Pearson* (2013) 56 Cal.4th 393, 438 (*Pearson*).)

"Ordinarily, 'the failure to object to the admission of expert testimony . . . at trial forfeits an appellate claim that such evidence was improperly admitted.' [Citations.] ' "The reason for the [objection] requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." ' [Citation.]" (*People v. Perez* (2020) 9 Cal.5th 1, 7 (*Perez*).)

But " ' "[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." ' [Citations.] Indeed, ' " '[our Supreme Court] ha[s] excused a failure to object where to require defense counsel to raise an objection "would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." ' " ' " (*Perez*, *supra*, 9 Cal.5th at pp. 7-8.)

" 'Evidence Code section 210 defines "relevant evidence" as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action*." (Italics added.)' [Citation.] 'Evidence is relevant when no matter how weak it is it tends to prove a disputed issue.' " (*Pearson, supra,* 56 Cal.4th at p. 438.)

Analysis

Having failed to raise in the trial court the argument that specific portions of Dr. Klein's testimony were irrelevant (to the question of damages), plaintiff has forfeited the argument on appeal. That only relevant evidence may be admitted at trial is a bedrock principle of law. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) The absence of on-point case law supporting the objection plaintiff failed to make does not implicate the "futility" exception to the forfeiture doctrine, because an objection on relevance ground would not have been unsupported by substantive law then in existence and would not have required anticipation of an unforeseen *change* in the law.[1] (*Perez, supra,* 9 Cal.5th at pp. 7-8.)

Accordingly, this claim is forfeited on appeal. (*Pearson, supra,* 56 Cal.4th at p. 438 [because "defendant did not object on relevance grounds," "his claim that the court erred . . . is forfeited on appeal"].)

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[1] Plaintiff's contention that—in light of postverdict rulings—"it seems like a foregone conclusion the trial court would have overruled [the] objections had they been made," is unpersuasive speculation that is inconsistent with concerns that animate the forfeiture doctrine, particularly in the context of expert testimony: giving the trial judge an opportunity to exclude the evidence or limit its admission to avoid possible prejudice; and allowing a proponent of the challenged evidence to lay additional foundation or take steps to minimize the prospect of reversal. (*Perez, supra,* 9 Cal.5th at pp. 7-8.)

Further, we observe that some of the testimony by Dr. Klein that plaintiff challenges on appeal was *elicited by plaintiff's counsel* at trial.

II

Instruction on the Duty to Mitigate

Plaintiff argues the trial court should not have given a jury instruction on her duty to mitigate damages. We disagree.

Additional background

The trial court instructed the jury with CACI No. 3930, Mitigation of Damages (Personal Injury), saying: "If you decide [defendant] is responsible for the original harm, [plaintiff] is not entitled to recover damages for harm that [defendant] proves [plaintiff] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [plaintiff's] effort in light of the circumstances facing her at the time, including her ability to make efforts or expenditures without undue risk or hardship. If [plaintiff] made reasonable effort to avoid harm, then your award should include reasonable amounts that she spent for this purpose."

In closing argument, defense counsel urged the jury to consider—in light of Dr. Klein's testimony that "conservative treatment" in the weeks immediately after plaintiff suffered her injury might have eliminated future pain and suffering and the need for "future care"—that plaintiff may have failed to mitigate her damages by not following Dr. Tarasenko's recommendation of physical therapy.

Parties' arguments

Plaintiff argues provision of CACI No. 3930 to the jury was "misleading," "because there was no evidence plaintiff failed to mitigate her damages." Specifically, plaintiff contends "there was no evidence plaintiff would have been able to get a physical therapy appointment if she had called for one, no evidence she would have been able to afford physical therapy, and no evidence she would not have been in pain at the time of trial if only she had undergone physical therapy."

Defendant argues there was evidence plaintiff "failed to take reasonable steps to mitigate her damages," because she (a) "could have . . . participat[ed] in physical

therapy" as recommended "by her treating physician," and (b) "cho[se] to unilaterally stop treatment with Dr. Tarasenko and cease any treatment for over one year."

Relevant legal principles

"A generally recognized principle of the law of damages is that 'a party must make reasonable efforts to mitigate damages, and recovery will not be allowed for damages that a party should have foreseen and could have avoided by reasonable effort without undue risks, expense, or humiliation.' " (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1049) This principle " ' " 'embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence.' " ' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 984.)

"[W]hile the burden of proving the extent of injury . . . actually incurred as a result of a defendant's tortious conduct lies with the plaintiff, the burden of proving the plaintiff . . . failed to mitigate damages . . . is on the defendant in a . . . tort action." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97.)

A party is entitled upon request to instruction on any theory supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) " ' "Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.' [Citation.] 'The focus is on the quality, rather than the quantity, of the evidence.' [Citation.] 'Inferences may constitute substantial evidence, but they must be the product of logic and reason.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1045.) Under the " 'substantial evidence' " test, "[w]e must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

Analysis

Here, 11 days after her accident, plaintiff went to see Dr. Tarasenko, a pain specialist. At that first appointment, Dr. Tarasenko referred plaintiff to physical therapy,

because he believed physical therapy could have been beneficial to plaintiff, "[i]f the radiofrequency ablation [was] performed first." Dr. Tarasenko did not know if plaintiff followed that recommendation.

When she started seeing Dr. Tarasenko, plaintiff had the ability to "go through the process of getting a primary care physician."

About one year later, in July 2017, plaintiff stopped seeing Dr. Tarasenko, because she was not obtaining the pain relief she hoped for. She "decided to take it upon [herself] to . . . adjust [her] life and deal with the pain." Plaintiff did not inform Dr. Tarasenko of her decision, and did not seek an appointment with a physical therapist at that point. From July 2017 to July 2018—when she began seeing Dr. Wong—plaintiff sought no professional treatment for her injuries from the accident.

Dr. Klein testified that "conservative treatment" like physical therapy would have been his recommended route for plaintiff's injuries at the beginning, as physical therapy "works 95 percent of the time." Further, he theorized that "sometime around the six- to nine-month period," plaintiff "became tenacious about holding on to her pain."

Giving defendant the benefit of every reasonable inference, and considering this evidence in the light most favorable to defendant, we conclude the trial court properly instructed the jury with CACI No. 3930, because the evidence permitted the following inferences that supported a conclusion plaintiff failed to make reasonable efforts to mitigate damages: (a) plaintiff did not pursue physical therapy treatment, despite her first treating doctor's recommendation;[2] (b) physical therapy treatment might have been

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[2] The jury reasonably could have concluded that—had plaintiff followed Dr. Tarasenko's recommendation (to pursue physical therapy) while he was treating her—she would have told him so.

beneficial to plaintiff (according to both her treating physician and the defense expert); and (c) plaintiff could have pursued physical therapy treatment.[3]

We disagree with plaintiff's contention that—given defendant's burden to prove that plaintiff failed to mitigate her damages—the *absence* of evidence that plaintiff "would have been able to get a physical therapy appointment if she had called for one" and "would have been able to afford physical therapy" was dispositive.

Though defendant had the burden to prove at trial that plaintiff failed to mitigate her damages, *plaintiff has the burden on appeal* to establish there was not s*ubstantial evidence* to support the instruction on mitigation.

Further, plaintiff provides no authority for the proposition that defendant had to produce evidence at trial affirmatively showing plaintiff *would have been able* to secure and pay for physical therapy, had she sought it. A party is not required to offer such specific counterfactual evidence that is "peculiarly known" to another party.[4]

Plaintiff's invocation of language in *Royal Thrift & Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, 41 that " ' "[i]f a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather

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[3] The jury reasonably could have concluded that, if plaintiff could have obtained a primary care physician, she could have seen a physical therapist.

[4] (Cf. *Hellman v. Anderson* (1991) 233 Cal.App.3d 840, 853 ["because knowledge about (and evidence of)" an issue was "peculiarly known to" one party, "the burden of proving" a relevant claim was "properly placed" on that party, given Evid. Code, § 500, which says, " '[*e*]*xcept as otherwise provided by law*, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense' "—language that recognizes " 'the burden of proof is sometimes allocated in a manner that is at variance with the general rule,' " in light of " 'the knowledge of the parties concerning the particular fact' " and " 'the availability of the evidence to the parties' "]; *Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1196 ["[b]ecause it is inherently difficult to accurately . . . reconstruct a counterfactual past," courts should be "vigilant[ ]" when confronting such efforts].)

than the other is chosen," ' " is inapt. The evidence at trial permitted the jury to draw the inference that, in failing to seek physical therapy (and failing to seek *any* treatment in the year before she began seeing Dr. Wong), plaintiff chose an *unreasonable* course.

III

Substantial Evidence for Verdicts on Past Economic and Future Noneconomic Damages

Plaintiff contends no substantial evidence supports the jury's verdicts on (1) past medical damages and (2) future pain and suffering. We disagree.

Standard of review

Under the substantial evidence test we "view the evidence in the light most favorable to the prevailing party, and resolve all conflicts in the evidence in favor of the judgment. [Citation.] The jury has the power to give whatever weight it chooses to the evidence and we will not reweigh the evidence or redetermine credibility." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 877.)

Past medical damages

Plaintiff contends substantial evidence does not support the jury's award of only $26,257 for past medical damages because "there is no substantial evidence that plaintiff would have incurred [her] . . . medical expense[s]" of $59,578.22 "in the absence of the collision." Plaintiff further contends "[t]here is also no substantial evidence" for "awarding an amount of past medical" damages "less than what [plaintiff] incurred," as there was "no evidence she failed to mitigate her damages."

But as we explained above, there *is* evidence permitting the inference that plaintiff failed to mitigate her damages, and it is plausible the jury reduced the award of past medical damages for that reason. Thus, this argument is unpersuasive.

Future pain and suffering

Plaintiff's contention that there was no "no evidence . . . to dispute plaintiff was suffering pain at the time of trial" similarly ignores the notion the jury may have found

that, having failed to mitigate damages for future pain and suffering, plaintiff was not entitled to *any* future damages (either future pain and suffering or future medical expenses). To make that finding, the jury did not—as plaintiff argues—have to disbelieve plaintiff's testimony that she was in pain.

IV

Evidence of Plaintiff's Procurement of Treatment

Plaintiff contends the trial court prejudicially erred by permitting defense counsel to elicit testimony regarding plaintiff's communications with her attorneys about treatment.

This claim fails, because we conclude plaintiff has failed to demonstrate prejudicial error.

Parties' arguments

Plaintiff argues the trial court abused its discretion under Evidence Code section 352[5] by admitting evidence that plaintiff "requested and received the names of providers with whom she treated from her attorneys" and "began treating with Dr. Wong around the time of her deposition," as that evidence was substantially outweighed by the probability of undue prejudice. "The evidence was prejudicial," plaintiff contends, "because it led the jury to find plaintiff only was entitled to recover approximately half of her past medical damages."

Defendant contends the argument is "at least partially waived," fails on the merits, and any error was harmless.

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5 "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Additional background

In an in limine motion before trial, plaintiff argued the challenged evidence would "prejudice the jury" by "push[ing] them, to engage in . . . improper speculation" that plaintiff's attorneys were "directing the treatment." The trial court denied the motion "without prejudice to [plaintiff] raising it later . . . if . . . something . . . c[a]me up during the trial that . . . that could potentially be prejudicial."

After the verdicts were announced, a poll of the jury revealed the jurors: (a) were unanimous on the award for past medical expenses; (b) split 11-1 on future pain and suffering; (c) split 10-2 on the award for future medical expenses; and (d) split 9-3 on the award for past pain and suffering.[6]

Relevant legal principles

"A judgment will not be set aside based on the erroneous admission of evidence unless 'the reviewing court is convinced after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant.' " (*Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1616.)

An appellant must demonstrate prejudice with an adequate record. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320.)

Among the "factors to be considered in determining whether an error prejudicially affected [a] verdict" are " 'the degree of conflict in the evidence on critical issues' " and

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[6] Juror No. 8 disagreed with the awards for future medical expenses and past pain and suffering. Juror No. 9 disagreed with the awards for past pain and suffering and future pain and suffering. Juror No. 11 disagreed with the awards for future medical expenses and past pain and suffering.

" 'the closeness of the jury's verdict.' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1070 (*Pool*).)

"When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255.)

"Absent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.)

Analysis

Assuming for the sake of argument that the trial court abused its discretion in admitting evidence that plaintiff obtained the names of her treatment providers from her attorneys,[7] and that plaintiff preserved this issue for appeal,[8] we conclude plaintiff has failed affirmatively to demonstrate that such error prejudicially affected the jury's verdict on past medical expenses.

First, we have an inadequate record on appeal regarding the amount of plaintiff's past medical expenses. (See *Brown v. Boren, supra*, 74 Cal.App.4th at p. 1320.)

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7 (Cf. *Winstead v. Lafayette County Bd. of Cnty. Comm'rs* (N.D.Fl. 2016) 315 F.R.D. 612, 616, fn. 3 ["a plaintiff should not be effectively punished for seeking *treatment*, particularly when that treatment was initially sought . . . prior to the onset of litigation," (italics added); but "a plaintiff who submits to an *evaluation* by an expert chosen by her lawyer is not seeking treatment—she's trying to advance her litigation position," (italics added)]; *Stephens v. Inland Tugs Co.* (1976) 44 Ill.App.3d 485, 489 [358 N.Ed.2d 324, 327] ["There is a significant difference between the role of [a treating physician] and that of a physician whose services are retained upon the advice of counsel with the hope of eliciting favorable testimony"].)

8 "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

Plaintiff testified that "the total of all bills from" her treatment "providers" was $59,578.22. But she did not explain how that total broke down into discrete financial obligations to different providers. She testified that "exhibit 13" was a fair and accurate description of the medical bills she owed, with the names of her treating providers, including the fire department that responded to the June 2016 car accident. But exhibit No. 13 is not in the record on appeal.

In her *briefing* on appeal, plaintiff represents the breakdown of costs contained in exhibit No. 13. But without a copy of that exhibit admitted into evidence at trial, we cannot confirm plaintiff's representation, and—perhaps more importantly—we cannot be confident that our analysis of the jury's award of $26,257 for past medical expenses will have taken into consideration *all* the evidence the jury had before it.[9]

Second, plaintiff's assertion that the admission of the challenged evidence "led the jury to find [she] only was entitled to recover approximately half of her past medical damages" (because "there was no admissible evidence [plaintiff's] conduct was not reasonable") ignores the real possibility, discussed above, that the jury determined plaintiff unreasonably failed to mitigate her past medical damages.

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[9] Plaintiff represents that exhibit No. 13 shows "Sacramento Metro Fire District: $1,947.04; Sutter Roseville Medical Center: $476.18; Open Advantage MRI: $2,350.00; Advanced Pain Management Institute: $21,011.00; Alamo Surgery Center: $31,580.00; Leonard Wong Chiropractic: $2,214.00." Even presuming that counsel has accurately represented the breakdown of the costs in exhibit No. 13, it is entirely plausible that exhibit No. 13 provides a *more detailed* breakdown of each treatment provider's costs (including *when* the treatment was provided), such that the jury's award of $26,257 might be better understood in light of the testimony of the timeline of plaintiff's treatment.

Further, two other exhibits reflecting "billing charges" to plaintiff were referenced during Dr. Tarasenko's testimony, but there is no indication in the record those exhibits were admitted into evidence.

Third, there was no real conflict regarding the evidence from which the jury could have found plaintiff failed to mitigate her past medical damages.[10]

Plaintiff's first treating physician recommended physical therapy at the first appointment. He did not know whether plaintiff followed that recommendation. Plaintiff offered no testimony that she ever pursued physical therapy, and offered no testimony that she reasonably could not have pursued it. Plaintiff stopped seeing her first treating physician (Dr. Tarasenko) without consulting him, and did not pursue professional treatment of any kind (including physical therapy) for her injuries/pain for about one year, before beginning treatment with Dr. Wong.

Because the jury may have limited its award of past medical damages due to a finding that plaintiff failed to mitigate, the lack of an evidentiary conflict on that issue militates against the notion the admission of the challenged testimony (regarding plaintiff's communications with her attorneys about treatment) was prejudicial. (Cf. *Pool, supra,* 42 Cal.3d at p. 1071 ["Were this the only evidence . . . a conflict would be present and a finding that the . . . error was prejudicial might be supportable"; but because "the only neutral witness" "agreed with [one party's] version of the facts" this factor did "not support a finding of prejudice"].)

Last, while the jury was split on *some* of the damages awards, it was *unanimous* on the award for past economic loss for medical expenses, the sole award that plaintiff contends was affected by the admission of the challenged evidence. Accordingly, this factor also militates against a prejudice finding. (Cf. *Robinson v. Cable* (1961) 55 Cal.2d 425, 428 ["that only the bare number of jurors required to reach a verdict agreed upon the verdict for defendants lends further support to the probability" the error "was the factor

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10 There *was* a conflict regarding the optimal timing of physical therapy for plaintiff. But as the evidence permitted the inference that plaintiff *never* pursued physical therapy, that conflict is of relatively minor significance now.

which tipped the scales in defendants' favor"]; *Wilson v. Southern California Edison Co*. (2018) 21 Cal.App.5th 786, 809 [as "[t]he jury split nine to three on four key questions," "this was a close case," and it was "reasonably probable that one or more additional jurors would have found in favor of [the losing party] on those questions in the absence of the challenged evidence"].)

V

Cumulative Error

Having found plaintiff's first claim forfeited, her second and third claims unpersuasive on the merits, and no prejudice from assumed error in connection with her fourth claim, we conclude there was no prejudice resulting from cumulative error.

DISPOSITION

The judgment is affirmed. Defendant shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
RAYE, P. J.

We concur:

/s/
ROBIE, J.

/s/
RENNER, J.